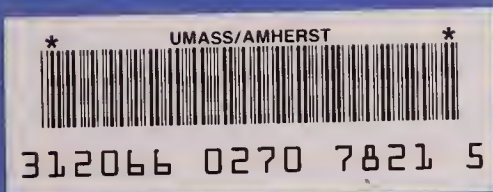


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ENABLING LEGISLATION for PLANNING AND ZONING

**STUDY REPORT NO. 2 - Municipal
Planning
and
Subdivision**

Feb. 1973



BUREAU OF REGIONAL PLANNING

MASSACHUSETTS DEPARTMENT OF COMMUNITY AFFAIRS

141 MILK STREET, BOSTON, MASSACHUSETTS 02109

January 1, 1973

Commissioner Miles A. Mahoney
Department of Community Affairs
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Mahoney:

Transmitted herewith is a proposal for the comprehensive revision of the municipal planning and subdivision control enabling statute for Massachusetts' cities and towns -- Chapter 41, Sections 81A-81GG of the General Laws.

The recommendations which are contained in this report are the product of a study of existing municipal planning and subdivision control legislation which commenced in 1967. At that time, the legislature established an Advisory Committee to study and report on municipal planning, subdivision and zoning laws (Chapter 141, Act and Resolves of 1967). The Committee first met in January of 1968 and since then has held some sixty odd meetings over a period of three years. The core of its membership has been unchanged since then, though there has been severe attrition in the original list.

In the late Spring of 1970, two and one-half years after the Committee began its work, the services of Professor William E. Ryckman, Jr., of the Boston University Law School, were made available. The report herewith submitted was written by Professor Ryckman. It faithfully records the opinions and recommendations of the Committee, but these have been healthily influenced by his knowledge and wisdom. The essential background material on the history and court decisions on the present law are entirely his contribution. Professor Ryckman must share fully the credit for this report; if there are errors in judgment, they belong to the Committee.

The Committee strongly suggests that this proposed revision of the municipal planning and subdivision control statute be given wide circulation and be subject to the review and comment of all those persons and groups with an interest in its impact. Among these are all of the city and town planning boards and the regional planning agencies, and also real estate and land development organization, and civic and citizen associations concerned with urban and developmental problems. This broad-scale

January 1, 1973

grass-roots review is essential to the development of the kind of local support necessary for favorable legislative action or to the generation of proposals for such modifications as would invoke that essential local support.

For the report on municipal planning and subdivision control submitted herewith, we urge that the Department of Community Affairs seeks widespread discussion in the hope of generating widespread support, with the prospect of submitting to the legislature a comprehensive revision of the subdivision control enabling statute (81A-81GG) along the lines that we have recommended.

Respectfully submitted,

John T. Howard, Chairman

Members of the Committee during 1970-1971

Professor John T. Howard	Department of Urban Studies and Planning Massachusetts Institute of Technology
Mr. Charles W. Eliot, II.	Metropolitan Area Planning Council
Mr. Sanford A. Kaplan	Massachusetts Hombebuilders Association
Mr. Robert W. Mayerson	American Institute of Planners Boston Section

Occasional Attendants

Mr. Richard Driscoll	Massachusetts Federation of Planning Boards
Mr. Evans C. Hawes	Massachusetts Department of Natural Resources
Mr. Carter Lee	Assistant Attorney General
Professor William Nash, Jr.	Department of City and Regional Planning Harvard Graduate School of Design Harvard University

Other Original Members

Mr. Arthur W. Brownell	Massachusetts Department of Natural Resources
Colonel Frank J. Cassidy	Massachusetts Federation of Planning Boards
Mr. Charles E. Downe	Planning Advisory Committee Department of Commerce and Development
Mr. Norman E. Northrup	Massachusetts Association of Real Estate Boards

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SUMMARY OF COMMITTEE RECOMMENDATIONS

Massachusetts laws governing the function of municipal planning and the regulation and control of land development in our cities and towns are generally 20 to 40 years old. They are not adequate to cope with the problems of the final quarter of this century.

The changes here proposed are minimal and conservative. They include only measures already tried out and proved effective in other parts of this country. But these measures have not been arbitrarily translated to our Commonwealth; they have been evaluated in the light of Massachusetts experience, and of Massachusetts problems and institutions. They are seriously and urgently proposed -- together with this committee's recommendations on revision of the zoning enabling statute, previously published -- as the least changes that are necessary to make it possible for our cities and towns to guide and control their future growth and development in the best interests of their people, and of all of the people of the Commonwealth.

There follows a summary of the principal changes from the present statutes proposed by this committee. The details and the rationale of the proposals are set forth in the text of the report.

MUNICIPAL PLANNING

Organization of Planning Boards:

Planning Boards mandatory for cities and for towns larger than 5,000 (rather than 10,000 as now).

Abolition of the few remaining Boards of Survey.

Membership of appointed Planning Boards to be confirmed by City Council or Board of Selectmen (whoever appoints).

Chairman to be appointed by the appointing authority -- Mayor, Board of Selectmen (rather than elected by the Planning Board, as now).

Comprehensive Plan, Nature and Content

Broadened to concern not only physical but also social and economic problems and issues of city or town development.

Required to consider environmental and ecological conditions and impacts.

Required to consider regional relationships and to be referred for comment to regional planning agencies.

Required to include recommendations for effectuating the plan's proposals.

Relationship of Planning Board to Developmental Decisions

Extension of mandatory referral to the Planning Board for advisory opinion, to include all actions affecting long-term development.

Requirement of mandatory referral not only by municipal agencies but also by state, county, or other public agencies intending actions within the municipality.

Notice of referrals to go also to the regional planning agency, if any, for comment.

Requirement of two-thirds majority to override a negative recommendation from the Planning Board.

Official Map

Inclusion on the official map (which continues to be optional in any city or town) of sites for public buildings and other public uses, as well as streets and parks.

Option for the official map to cover only one or more parts of a municipality, and to display only certain major classes of streets and public-use sites.

After adoption by the municipal legislative body, building permits denied for locations reserved for future public use, subject to Board of Appeals relief.

SUBDIVISION CONTROL

Administration and Authority

Requirement that subdivision control regulations be enacted by the city council or town meeting (rather than, as now, only by the Planning Board).

Requirement that any city or town that has established a planning board shall regulate and control subdivision.

Option to delegate administration of approved subdivisions and enforcement of requirements to other officials, including authorization of minor changes.

Public Facilities to be Provided by Developer

Extend the requirement to provide improved streets to allow the requiring of dedication of land for local parks and playgrounds, or payment in lieu.

Allow requirement of installation of utility capacity to serve future adjoining development, subject to compensation for excess costs.

Relation to Zoning

Allow, if spelled out in a local ordinance or by-law, minor modifications in zoning dimensional requirements by the Planning Board for a specific subdivision.

Exemption from Subdivision Control Procedures and Regulation

Restrict exempt subdivisions ("approval not required") to those which do not create one or more additional building sites (regardless of whether there is frontage on existing ways), and which do not create or increase any nonconformity to any applicable zoning dimensional requirement.

"Paper Subdivisions"

Allow Planning Boards to initiate resubdivision of obsolete and undeveloped "paper subdivisions," subject to recovery of damages (if any) by owners (if any).

Appeals

Elimination of appeal from Planning Board to Board of Appeals.

Municipal Planning - Ch. 41, Sections 81A-81D
(Present Law)

Current municipal planning legislation had its origin in St. 1913, c. 494 which "authorized and directed" every city and town having a population of more than 10,000 (and "authorized" with respect to cities and towns with a population of less than 10,000) to create a planning board charged with the responsibility to "make careful studies of the resources, possibilities and needs of the city or town, particularly with respect to conditions which may be injurious to the public health or otherwise injurious in and about rented dwellings, and to make plans for the development of the municipality with special reference to the proper housing of its people." Even in this early act the need for coordination between planning authorities in local communities and planning authorities in the region and state was recognized. Section 3 of the Act of 1913 provided that the Homestead Commission created in 1911, which in Chapter 607 was charged with producing a plan whereby "homesteads or small houses and plots of ground may be acquired by mechanics, factory employees, laborers and others in the suburbs of cities and towns", should "furnish information and suggestions from time to time to city governments and to ... local planning boards ... such as may ... tend to promote the purposes of [the] Act [of 1913] and those for which the ... Commission was established."

Prior to the Act of 1913 the legislature had provided for the establishment of boards of survey by cities and towns. Such boards, where created, performed a limited planning and official map function (i.e., plans "showing ... the location of ... ways, whether already laid out or not, as in the opinion of the board the interest of the public may require") as well as a limited subdivision control function (i.e., approval of plans by private owners for the opening of "private ways for public use").

By Chapter 31 of the resolves of 1931 the legislature provided for the creation of a special commission to study and revise the laws relating to zoning, town planning and the regulation of billboards and other advertising devices. In its final report (House Document No. 1240, January, 1933) the Commission "saw no need to alter the fundamental conception of the statutes of long-standing." However, the committee was impressed with the "desirability of permitting the merging of the functions of the board of survey with those of the planning board" since "in many towns it seems that these duties fit better into the work of the planning board than into that of the board of selectmen, and, furthermore, there is grave doubt that that many boards of selectmen already have more than enough executive work to do." Furthermore, the Commission believed that the prior law "relating to the creation of planning boards [did] not give an adequate basis for effective work. About all that it [provided was] that there shall be a planning board, which shall make investigations and report. The success or failure of the work of the

board [was] left to depend largely upon the type of board which a town [might] happen to get." (Id. at 30). Therefore, the commission recommended a new planning act in substitution for the prior law relating to municipal planning boards and boards of survey which a municipality might or might not accept as it desired. "It need not repeal its existing planning board and board of survey organization, if it had one, in favor of that of a new law, but a city or town hereafter establishing a planning board would so under the improved arrangements. It may accept or not the new draft of powers for official mapping and for plotting control." (Id. at 31)

In principle, the recommendations of the Commission were accepted by the legislature although in form they were not. Instead of striking Sections 70 through 81 (subject to a savings clause authorizing cities and towns who desired to continue to operate under the prior law to continue to do so) and substituting therefor a new planning law granting newly created planning boards additional powers relative to subdivision control as well as the powers traditionally exercised by planning boards and boards of survey, the legislature decided to add a series of new sections at the end of Chapter 41 which were captioned "improved method of municipal planning". A new paragraph was also added to section 70 and 73 which prohibited the establishment of a planning board or board of survey pursuant to the respective section after December 31, 1936. The new act did not incorporate the committee's recommendations that the population figure for the mandatory establishment of planning boards be reduced from 10,000 to 5,000.

The revisions of 1947 and 1953 continued the arrangement of the 1936 Act with the exception that in the 1953 revision there was an effort made to separate those sections of the 81 series which deal with planning from those sections which deal with subdivision control. See Report of the Special Commission on Planning and Zoning, House Document No. 2249, page 53 (December, 1952). Thus, St. 1953, c. 674, Section 7 provided that "section 81K to 81GG, inclusive, shall be designated and may be known as 'the subdivision control law'".

An analysis of the significant features of the municipal planning law ("improved method of municipal planning") as currently amended, follows:

c. 41, Section 81A - every city or town achieving a population of 10,000 or more must establish a planning board. Cities or towns with less than 10,000 population may do so. In cities the planning board members are appointed by the mayor or in city manager cities, by the city manager subject to confirmation by the city council and in towns they may be elected at the annual town meeting or may be appointed as the town meeting determines. In towns having section 70 planning boards, the town meeting may vote to establish a planning board under section 81 and the members of the old planning board continue to serve until the following town meeting. Planning board members serve a five year term, the terms

being staggered so that the term of at least one member expires annually. In towns of less than 10,000 population, the towns may vote to have the selectmen act as a planning board. Planning boards elect a chairman and clerk from among their members and may employ "experts and clerical and other assistance." (One Massachusetts case held that lawyers are not "experts" within this authorization. O'Reilly v. Town of Scituate, 328 Mass. 154 (1952)).

c. 41, section 81B - provides for the transfer of all powers formerly exercised by planning boards established under section 70 and boards of survey established under section 73 to section 81A planning boards when they are established. This section also authorizes planning boards to "enter upon any lands and there make examinations and surveys, and place and maintain monuments and marks" as they deem necessary in carrying out their duties under the municipal planning law but any person injured in his property by such entry or other act without his consent may recover the damages caused by such activities as provided under c. 79 (eminent domain). This section confers jurisdiction on the Superior Court for the county where the land affected by the law is located, sitting in equity, to act on petitions of planning board established under Section 81A to enforce any of the provisions of the municipal planning law. An example of the exercise of this power would be a suit to compel the city or town to submit matters relative to the laying out of ways to the board for its consideration and report. See c. 41, Section 81I; Poremba v. City of Springfield, 354 Mass. 432 (1968).

c. 41, Section 81C - provides that planning boards shall "from time to time make careful studies and when necessary prepare plans of the resources, possibilities and needs of the city or town" which they will report on with recommendations to the city council or selectmen. The board is also required to "report annually to the city council or to the annual town meeting, giving information regarding the condition of the city or town or any plans or proposals for its development and estimates of the cost" of such projects and also must furnish a copy of the same to the Department of Commerce and Development. Section 81C also provides that the planning boards established under Section 81A may be authorized by vote of a town meeting to act as the park commission.

c. 41, Section 81D - provides that the planning board by majority vote shall make a "master or study plan" which shows "among other things, existing and desirable proposed public ways, street grades, public places, bridges and tunnels, viaducts, parks, parkways, playgrounds, sites for public buildings and structures, building and zoning districts, pierhead and bulkhead lines, waterways, routes of railroads,

buses and ferries, and locations of sewers, water conduits and other public facilities and other such pertinent features of such a plan, including existing private ways." After consultation with municipal agencies charged with enforcing housing laws and with the local housing or redevelopment authority, the board is charged with designating in the plan "conservation, rehabilitation and development areas for the purpose of guiding residential protection, neighborhood improvement and urban renewal programs."

c. 41, Section 81I - provides for the utilization of the planning board in an advisory capacity in a variety of contexts. In communities which have adopted an official map c. 41, Sections 81E - 81H (the official map law) clearly establish a role for the planning board in connection with the laying out, alteration, relocation or discontinuance of public ways. In communities which have not adopted an official map (i.e., the vast majority of Massachusetts cities and towns) Section 81I provides that such proposed activity shall be referred to the planning board for its consideration and report. This section further provides that communities with planning boards established under c. 41, Section 81A may "provide for the reference of any other matter or class of matters to the planning board before final action thereon, with or without provision that final action shall not be taken until the planning board has submitted its report or has had a reasonable fixed time to submit such report."

(Committee Recommendations)

The Committee believes that municipal planning should aim at achieving the integration of relevant planning at all levels of government. Functional plans for transportation, open space, conservation, housing, commercial and industrial development, etc., must be interrelated into comprehensive plans which take into account the physical, economic, social and governmental factors which exist in the municipality and the region where it is situated. Current municipal planning, considered in terms of such aspirations, must be regarded as something less than successful. The typical planning board, having no staff and being preoccupied with subdivision control duties, can give scant attention to the planning function. Furthermore, the role of the planning board in the totality of the planning process, whether at the creative or implementation stage, is imperfectly or inadequately defined by the existing legislation. The recommendations of the Committee are aimed at correcting these deficiencies, whenever possible, within the framework of existing legislation, rather than by repeal of the current zoning, subdivision control and planning laws and the substitution therefor of a unified land development law along the lines of the proposed American Law Institute Model Code. Although the Committee recognizes the "fresh start" advantages of the latter approach, it believes that on balance they are offset by difficulties of education and implementation which are inherent in wiping the slate clean. After careful analysis of the existing legislation, the Committee is persuaded that changes within the framework of the existing structure can be made which will significantly improve the planning process without the political, psychological and administrative disruptions of the alternative approach.

The Committee believes that two threshold problems of organization must be resolved as a condition precedent to the revision of the Massachusetts planning legislation. The first of these involves the substantive relationship between state legislation for planning, subdivision control and zoning, and a parallel question of administration. In other words, should the enabling legislation be combined into a comprehensive municipal planning law and should the same agency have responsibility for more than one of these functions? Several departures from the current organizational structure were considered by the Committee. One would combine the enabling legislation into a single chapter but would preserve the existing administrative setup, i.e., the planning board would retain primary responsibility for planning and subdivision control while the building inspector or department and the zoning board of appeals would retain responsibility for the administration of zoning. Another approach would be to combine the zoning and subdivision control functions in a single separate agency, retaining for the planning board only the planning function. A variation of this would be to give communities the option of setting up an agency with combined planning and

developmental powers analogous to the situation in Boston where the Boston Redevelopment Authority has primary responsibility for planning as well as development. Although all of these alternatives have some advantages, the Committee has decided not to recommend any fundamental departure from the existing organizational setup. With respect to the reorganization of the enabling legislation into a comprehensive chapter of the general laws, the Committee, although agreeing that there should be an awareness of the inter-relationship of zoning, subdivision control and planning, was finally persuaded that the theoretical advantages of combining such legislation were offset by the practical disadvantages of requiring local administrative officials to re-orient themselves with new terminology, statutory references, etc. With respect to the combining of the subdivision control and zoning administrative functions under a single agency, the Committee was persuaded by the arguments previously applied in deciding not to propose the adoption of a land development code, viz., the disruption of ongoing operations attendant upon such an enterprise.

The other preliminary organizational question considered by the Committee involves the status of planning boards established under Chapter 40, section 70 and boards of survey established under Chapter 40, section 73. Since 1936 no new Section 70 planning boards or Section 73 Boards of Survey have been created (see St. 1936, c. 211), but what treatment should be afforded the pre-1936 boards? Weighed against the desirability of adopting statewide uniform procedures and techniques for subdivision control and planning are several arguments for preserving the traditional entities intact. First, it is possible that some communities may have established sections 70 planning boards or section 73 boards of survey which are not required by section 81A to establish planning boards and have not elected to adopt subdivision control, and who would, therefore, be deprived of any planning or limited subdivision control function if sections 70 through 80 were repealed. Furthermore, it may be that some communities would prefer to continue to have a limited subdivision control function performed by a separate agency rather than by the planning board. Therefore, in the interest of encouraging the use of uniform procedures in cities and towns, the Committee recommends that all Boards of Survey be abolished. In communities which presently have a planning board established under Section 70 and a board of survey the section 70 planning boards will be re-established under Section 81A. In communities which have no planning board, but which have established a board of survey under Section 73, the board of selectmen will be authorized to act as boards of survey until such time as they vote to establish a planning board.

The Committee recommends the following changes in Section 81A. The present 10,000 population limit for mandatory establishment of planning boards should be lowered to 5,000 so that formal planning processes will begin earlier in communities currently on the verge of urbanization or dramatic growth.

Unregulated development which raises the population of such communities to the current 10,000 figure for mandatory establishment often has a detrimental effect on the long-range development of the community quite out of proportion to the ultimate size of the community, since by the time the town awakens to the need for planning, or is required to do so by the mandatory establishment of a planning board, irreversable developmental decisions of a highly adverse character may already be a fact of life. The Committee believes that such congenital planning deformities can be greatly reduced by imposing the lower threshold of 5,000.

The Committee also recommends a number of minor changes in Section 81A designed to attract more qualified people to serve on planning boards and otherwise increase the efficiency of planning board activities. In towns which elect the option of having planning boards appointed, such appointments should be made by the selectmen, or town manager (subject to confirmation by the Board of Selectmen) in order to insure the highest level of cooperation between the respective boards. The towns should have the option of providing for the appointment of the planning board chairman by the selectmen or town manager (subject to confirmation by the board of selectmen) instead of the mandatory internal election procedure currently required. In cities, where appointment of the board is mandatory, the chairman should be appointed by the Mayor, or city manager, depending on the charter, subject to confirmation by the city council in either case. The enabling act should be amended to permit certain elected officials such as the selectmen to serve on planning boards, but ex officio municipal employee or non-elected official members should not be permitted. The Committee also recommends that planning board members be removable for cause in towns as well as in cities, and that cities and towns which provide for a professional municipal planning staff should have a local option as to whether such staff is under the planning board, selectmen, city council or city manager, and whether the professional planners so employed are under Civil Service.

The Committee recommends basic changes in the current planning law relative to the definition of the contents of the comprehensive plan and the procedures to be followed by the planning board in performing the planning function. A new definition of the "comprehensive plan" is proposed which covers both the "studies and reports" function of 81C and the "master or study plan" function of 81D. The Committee's proposed draft recognizes three distinct elements in such a plan: 1) A statement of community goals and objectives; 2) a statement based on the goals and objectives, expressed in words or numbers and in maps or graphic descriptions, of policies, standards, and proposals for the various elements of community service and development; 3) a statement describing in general terms the means recommended to be used to effectuate such policies, standards, and proposals. The Committee believes that the planning process as currently described in Section 81C and 81D is a classic example of putting the "cart before the horse" in that it seeks to

evaluate and recommend with respect to community needs, resources, etc. (81C), with a view to defining the future physical characteristics of the community (81D), without a prior articulation of goals relative to future population and social structure, economic development and overall quality of life (health, education, welfare and recreation services). Thus, the following draft definition of a "comprehensive or general plan" is designed to make clear the relationship between the goals of a community and proposals for achieving these goals as well as physical descriptions of the community when the goals are achieved.

Advisory Committee Draft of Proposed Definition of Comprehensive or General Plan

A. The planning board of each city and town shall prepare a comprehensive or general plan of the city or town and from time to time revise, extend, or amend it as hereinafter provided. Such plan shall be based upon a careful inventory, analysis, and projection of local and regional social, economic, and physical conditions and problems. Such plan shall take as its target or horizon date a time generally not less than twenty nor more than fifty years later than its date of adoption. For each of the elements prescribed in the following section, it shall set forth its proposals from the date of adoption for successive periods towards the target date, in appropriate verbal, numerical, and graphic terms. In the preparation of the plan the board shall consult with such municipal and other public and private agencies as it deems to be concerned with the various aspects of the plan. The board shall be provided access to such information as is reasonably necessary to its studies but without undue inconvenience or expense to such cooperating agencies.

B. The comprehensive or general plan shall include but not be limited to the following:

1. A statement of community goals and objectives, concerning:
 - a. The number and social structure of the future population;
 - b. The economic development and employment opportunities of the community;
 - c. The quality of health, education, welfare, and recreation services;
 - d. The quality of the environment in terms of air and water pollution and visual and other relevant factors;
 - e. The conservation and proper utilization of natural and man-made resources;
 - f. The involvement of citizens in the processes of development and change;
 - g. The role of private enterprise in the processes of development and change;
 - h. The relationship of the city or town to the surrounding region or metropolitan area, and to such official regional or metropolitan plans as may then exist.

2. A statement based on the goals and objectives, expressed in words or numbers and in maps or graphic descriptions, of policies, standards, and proposals for the various elements of community service and development, including but not limited to:

- a. Land use, describing desired patterns and densities of land to be used for residence for various family types, for business, industry, agriculture, forestry, recreation, public and institutional use, conservation and open space, and any other necessary purpose;
- b. Circulation and Transportation, including routes and terminals for the movement of people and goods by private or public vehicles by land, air, and water;
- c. Community facilities and utilities such as schools, parks and playgrounds, water, sewerage and drainage systems, waste disposal facilities, power distribution facilities, safety, health and welfare facilities, libraries and other cultural facilities;
- d. Such other factors as cannot be expressed in terms of spatial location or physical facilities, if appropriate and necessary to the goals and objectives, such as levels of health services, economic range of housing choices, standards of air quality, policies for social change or welfare service, or levels of employment or income.

3. A statement describing in general terms the means recommended to be used to effectuate such policies, standards, and proposals, which may include but are not limited to:

- a. Proposals for the adoption or amendment of such police-power regulations as zoning, subdivision control, housing codes, official maps, building codes, or air pollution or noise abatement codes;
- b. Proposals for programs of capital improvements including the acquisition of land and the construction of facilities for public purposes, with regard to the operating as well as capital costs of such facilities in relation to community resources and responsibilities;
- c. Proposals for acquisition of partial rights in land or property for such purposes as the preservation of historic buildings or scenic amenities or the conservation of natural resources;

- d. Proposals for programs for housing, urban renewal, or industrial development, or other programs involving collaboration between the city or town and private or civic enterprise or state or federal agencies;
- e. Proposals for such other public measures as may be considered necessary or desirable for accomplishing the plan, such as changes in tax policy or in rates or charges for municipal services such as water supply, parking, utility extensions, sewer service, refuse disposal, and street improvements;
- f. Proposals for improving the effectiveness of municipal activities either within the city or town government or in coordination with regional, state or federal agency operations affecting the physical, social, and economic problems and opportunities of the municipality.

With respect to the procedure to be utilized in the creation of the comprehensive plan as just defined, the Committee recommends a more elaborate process than that currently prescribed, designed to solicit responses to a proposed plan by those segments of the local community who will be most directly affected as well as those agencies outside the community who can and should make a meaningful contribution to the local planning process. The Committee is particularly concerned about the current lack of effective consultation with and utilization of regional planning agencies in the development of the plan. Thus, the Committee proposes a mandatory referral of the proposed plan to such regional and state planning agencies as well as the board of selectmen or city council and municipal agencies charged with effectuating community goals in the area of housing, redevelopment, conservation, etc. After such referral and a public hearing, adoption with or without revision would be by the planning board by majority vote as currently provided. Also required would be an annual report by the planning board to the town meeting or city council on the status of the plan as well as a provision for amendment and periodic review.

The Committee also recommends that the mandatory and permissive referral requirements of Section 81I be strengthened so as to achieve more effective utilization of the expertise of the planning board in connection with various municipal activities - particularly those with planning implications. Under the existing law only proposed zoning amendments and proposed actions relative to the laying out of public ways require mandatory referral to the planning board for its consideration and report. (See Chapter 40A, Section 6 and c. 41, Section 81I) The Committee proposes to expand the list of mandatory referrals to the planning board for consideration and report to include proposed municipal or state acquisitions of real estate other than by tax foreclosure and gift, and disposition of municipally owned property by any means. Also required to be referred would be ordinances, by-laws and resolutions of the town meeting

or city council and acts or orders of any administrative official or agency which would affect the master plan or concern the character, extent, location or long-term use of public buildings, major utility installations or other major public facilities. Where the matter referred requires action by the Town Meeting, City Council, Board of Aldermen or Board of Selectmen, disapproval by the Planning Board would affect the vote required to adopt or approve by the referring agency or body, i.e., a two-thirds vote would be required. In the case of matters referred from non-municipal sources (e.g., a state agency) the Planning Board action would be advisory only. The Committee also recommends that whenever a matter is so referred to a municipal planning board said board should give notice of such referral to the regional planning agency, if any, describing the character, location and extent of the proposed action being referred.

Advisory Committee Draft of Proposed Revision of Chapter 41, Section 81I

In any city or town having a planning board established under Section 81A but which has not adopted an official map, no public way shall be laid out, altered, relocated or discontinued, unless the proposed laying out, or alteration, relocation or discontinuance has been referred to the planning board of such city or town and such board has reported thereon, or has allowed 45 days to elapse after such reference without submitting its report. In any city or town having a planning board established under Section 81A all town by-laws or city ordinances or resolutions and all acts or orders of any administrative official or agency of the city or town which affect the acquisition of an interest in real property, other than by tax foreclosure or gift, and its disposition by any means, or which concerned the character, extent, location or long-term use of public buildings, major utility installations or other major public facilities, before adoption and before they shall become legal or binding upon the city or town, shall be submitted to the planning board for a report and recommendation. Any matter so referred to the planning board shall be acted upon by the planning board within 45 days from the date of their referral, unless a longer time be agreed upon by the referring agency. If the planning board shall fail to act within the time aforesaid, it shall be deemed to have approved such matter. The planning board shall give notice describing the character, nature and extent of the matter referred to the regional planning agency, if any, which serves the region in which the municipality is located. No matter so referred to the planning board which requires action by the town meeting, city council, board of aldermen or board of selectmen which is disapproved by formal action of the planning board shall be adopted or authorized except by a two-thirds vote of the aforesaid bodies. If any plan, design, or other proposal concerns the character, extent, location or use of any public improvement or public property or change thereof within the territorial limits of the city or town that does not under the law governing the same fall within the province of the city or town or any official agency thereof, then the submission to the planning board shall be by the state, county, district, or other official board, commission or body having jurisdiction over such public improvement or property, and in such cases the planning board shall report to such body or agency its recommendations, if any, within 45 days from the date of such referral. Any city or town having a planning board established under section eighty-one A may, by ordinance, by-law or vote, provide for the reference of any other matter or class of matters to the planning board before final action thereon, with or without provision that final action shall not be taken until the planning board has submitted its report or has had a reasonable fixed time to submit such report. Such planning board shall have full power to make such investigations, maps and reports, and recommendations in connection therewith, relating to any of the subjects referred to it under this section, as it deems desirable.

Official Map Law - Ch. 41, Sections 81E-81H
(Present Law)

Since the beginning of the Eighteenth Century when land in cities and towns in the eastern United States not devoted to public use passed to private ownership, the urban areas have been faced with the need for a tool to reserve private land for future public use at the lowest possible cost to the community. Thus, in New York in 1806, Brooklyn in 1818 and shortly thereafter in Baltimore and other Pennsylvania cities, so-called "official map laws" were enacted which provided that if buildings were erected in the location of streets shown on an official map after the plan was filed by the appropriate local authorities, when the proposed street was actually established and constructed and the land within its limits taken by eminent domain, the owners of such buildings should receive no compensation for the destruction of the buildings. A similar provision was enacted in Massachusetts in 1891 by c. 323 which provided in Section 9 that "no compensation shall be given for land taken for a street, if the owner, after the filing of a plan in accordance with the statute, shall erect any building within the boundaries of any way and not remove it when required by the street commissioners." In Edwards v. Bruorton, 184 Mass. 529 decided in 1904, the Massachusetts Supreme Court joined the courts of New York, Maryland and Delaware in holding such acts unconstitutional. The court said that "If [the statute] could have that effect it might materially interfere with the use an owner might desire to make of his estate for many years after the filing of the plan and before the laying out of a way. The statute prescribes no compensation for this interference with private property. The legislature cannot constitutionally so interfere with the use of property without giving compensation to the owner." Id. at 532.

In the Standard City Planning Enabling Act, prepared by the United States Department of Commerce in 1928 (referred to as SPEA) two alternative techniques for dealing with the community needs which gave rise to the old official maps laws were recommended. The preferred technique, contained in Title III, has become known as the "eminent domain method" or "Massachusetts Plan" because the original model legislation was drafted by Phillip Nichols of Boston, a leading authority on the law of eminent domain. Basically, it provided for the legislative reservation of private land for future acquisition for public streets after recommendation by a planning authority. This reservation of the location of a future street is not intended to constitute the opening or establishment of the street or the taking of the land for street purposes. The actual opening and improvement of the street may or may not be carried out; and the city acquires only a reservation of the land necessary to carry out the street plan as long as it remains on the official street plan. (See F/N 104, SPEA). Thereafter, a board of appraisers is appointed to determine what compensation is to be paid for such reservations with a right of judicial appeal, and no compensation will thereafter be paid to any person for the taking of a

building or injury or damage to a building, or other improvements which may be built upon within the period fixed in the resolution of reservation upon the land included within the street location indicated on the official plat. "This means that an owner, having had notice that in all probability a street will run within certain lines included in his property and having been paid full compensation for the damage, if any, which he may have suffered in not being able to utilize freely and safely that portion of his property by the erection of buildings of a permanent nature, can, however, erect as many buildings as he desires in the bed of the proposed street, with the knowledge that, when the time comes actually to open the street in question and make it a public street, he will receive no compensation for such buildings, though he may get a very valuable use out of them in the interim. He is perfectly free to make any use of the bed of the mapped street." (F/N 121, SPEA).

The other technique, known as the "police power method" or the "New York method" (because it was first adopted there), attempts to prevent or reduce the building on mapped future streets by the prohibition or regulation of such development, subject to the right of the owner, "if the land within such mapped street or highway is not yielding a fair return on its value to the owner" to apply to the board of appeals having power to make variances or exceptions in zoning regulations to "grant a building permit for a building in such street or highway which will, as little as practicable, increase the cost of opening such street or highway or tend to cause a change of such official map or plan...." See Ch. 690 of the laws of 1926 of the State of New York entitled: "An Act to Amend the General City Law in Relation to Official Maps and Planning Boards."

The final report of the Special Commission established in 1931 by the Massachusetts legislature to study and revise the laws relative to zoning and town planning recommended that the police power method proposed by Edward M. Bassett and Frank B. Williams in their report entitled "Forms for community planning legislation" (made an Appendix to the Report of the Commission in 1933) be adopted. Section 72 of the commission draft provided that cities and towns should adopt an "official map showing public ways and parks therein as theretofore laid out and established by law and the private ways then existing" and that the city council or town meeting might "whenever and as often it may deem for the public interest, change or add to such maps so as to place thereon lines showing proposed locations of new or widened public ways and new or enlarged parks, and notations showing proposed discontinuances of existing or mapped public ways and parks." (House Report No. 1240). Section 76 then provided that "for the purpose of preserving the integrity of such official map, no permit shall hereafter be issued for the erection of any building or structure within the limits of any public way or park shown on or made a part of such map, except as provided in this section. If the land within such mapped public way or park is not yielding a fair return, the board of appeals provided for in Section 78 shall have the power in each specific case, by the vote of the majority of its members, to grant a permit for a building or structure in such mapped public way or park which will as

little as practicable increase the cost of subsequently establishing such mapped public way or park as a public way or park or tend to cause a change in such map...." (House Report No. 1240, page 58). These proposals were not adopted. Acts, 1936, c. 211, Section 81C provided that "towns may ... adopt an official map, prepared under the direction of the planning board, showing ... public ways and parks ... theretofore laid out and established by law and private ways then existing and used in common by more than two owners" as well as "proposed locations, not theretofore mapped, of new or widened public ways and new or enlarged parks, and proposed discontinuances in whole or in part of existing or mapped public ways or parks." However, section 81D provided that the prior sections did not "abridge the powers of the city council or the selectmen or any other municipal officer in regard to highways or parks in any manner...nor shall they authorize the taking of land, nor authorize the city or town to lay out or construct any way or widen thereof which may be indicated on such map until the same has been laid out as a public way, nor authorize a city or town to discontinue or close any way or park as indicated on such map except in accordance with the laws governing the same." Thus, as a practical matter, the Act of 1936 had no binding effect with respect to proposed public ways or parks except as it gave notice to landowners of contemplated future acquisitions by the community.

The revision of 1947 (Act 1947, Chapter 340) strengthened the official map law but still fell far short of the institution of the police power method recommended by the commission in 1933. Section 81G established a referral requirement, i.e., "After a city or town has adopted an official map ... no public way shall be laid out, altered, or relocated or discontinued if such ... is not in accordance with such official map ... unless the proposed laying out ... has been referred to the planning board of such city or town ... and such board has reported thereon ..." The new Section 81J then provided that "a town which has a planning board ... may establish, in the manner provided for the laying out of town ways, the exterior lines of any way, the location of which has been approved under [the prior procedure] ... and thereafter no structure shall be erected or maintained between an exterior line so established, except that buildings or parts of buildings existing at the time of the establishment of said lines may remain and be maintained to such extent and under such conditions as may be prescribed by such planning board." (emphasis supplied) Unfortunately, this amendment did not clearly provide for reservation for future use, since the qualifying language as underlined above would appear to require the traditional "laying out" procedure of Ch. 82, sections 21-24.

In 1953 and again in 1955 further attempts were made to strengthen the official map law by Special Commissions created by the legislature to study zoning, planning and subdivision control. In an appendix to the Committee Report of 1953 (House Document No. 2249) Phillip Nichols, on behalf of the Massachusetts Federation of Planning Boards described the proposal (House Bill No. 854 of 1951) as follows:

"It is unfortunate that Massachusetts was not allowed to lead the way, as it so often has done in progressive legislation, but at any rate we can profit by the experience of other states. It seemed that the time had come to make another attempt to provide for the protection of the location of proposed ways shown on official maps. The federation, therefore, in 1951, caused to be introduced legislation following the New York or "police power" method. This is House Bill 854, now before the Special Commission. The legislation is built around the existing statutes relating to the official map which have been little used, since an official map without any sanctions is like the play of Hamlet with Hamlet left out.

It is proposed that the statute should be included in that part of Chapter 41 of the General Laws which relates to city planning. It consists of three sections. It is applicable in such cities and towns only as adopted. The first Section (81F-1/4) prohibits the granting by an inspector of buildings of a permit for the erection of a building in the location of a public way shown on an official map. The second section (81F-1/2) allows an owner denied a permit to appeal to the planning board which in case of great hardship may rescind or modify the prohibition. The third section (81F-3/4) gives an owner aggrieved by the failure of the planning board to provide adequate relief, a further appeal to the Superior Court, which may give him relief if his constitutional rights are found to be violated."

The attempt was a failure. House Bill 854 was rejected by the legislature as was a similar proposal by the 1955 Commission (see House document 2480, pg. 12, 13 and appendix H), and today the official map play is still produced without the leading character. The only changes in the "official map law" adopted by the General Court during this period were St. 1956, c. 279 which made section 81J applicable to cities as well as towns and St. 1953, c.674 which added the following sentence to Section 81J: "Any person injured in his property by the establishment of exterior lines under this section may recover damages so caused under Chapter 79." However, it is doubtful whether this provision really added anything to the prior law since Chapter 82, Section 24 had long provided that "any person sustaining damage in his property by the laying out, alteration or relocation of a town way or private way shall be entitled to recover the same under ... Chapter 79"

Several other aspects of the Massachusetts laws relating to "official maps" should be noted. First, it is important to keep in mind the distinction between "official map" and the "master" or "general" plan. The difference was well articulated by Bassett and Williams in their 1932 report where they noted:

"A master plan embraces many features not included in an official map or plan. A master plan, therefore, does not usually show precise data founded on careful surveys, while the official plan, upon which the details of both public and private works must be based, should be capable of accurate interpretation. The master plan, therefore, may be characterized as plastic, the official plan as rigid. ... the official map ... shows 'the streets, highways, and parks theretofore laid out, adopted and established by law.' In other words, it is an 'as is' map, and furnishes a definite starting point or basis for improvement. The master plan is a mine of information. From it, perhaps with adaptations, are taken features that should be added, from time to time, to the official map, every new street or park being first an amendment to the official map." House Document No. 1240 - 1933, pg. 96.

It would appear that this is a particularly apt description of the difference between the master plan and the official map of Massachusetts, since the evolution of the official map law here, as previously described, has minimized its role in determining the location of future streets and park sites.

Second, it is clear that the "official map" serves a function other than that relating to reservation for future streets in communities which have adopted one. It is a source of information to those who desire to ascertain the location or current status of streets or parks and other public or quasi-public facilities within the community. Section 81E provides that the map "showing the public ways and parks ... and private ways ... used in common by more than two owners" shall be filed with the appropriate Registry of Deeds. Changes, as they are legally made, automatically become a part of the map. See Section 81H. In this connection the map may have a limited role in the administration of the subdivision control law since Section 81E provides that "after a plan bearing an endorsement of approval or accompanied by a certificate as provided in the subdivision control law has been recorded, the ways shown on said plan shall be and become a part of the official map." Thus, it would be a convenient source of information to the planning board and the public with respect to prior action relative to private ways. Beyond this, however, its role in the area of subdivision control is limited since Section 81V provides that "except as provided in Section 81E, the existence of an official map in a city or town shall not effect the operation of the subdivision control law therein." As an example of the possible application of this section, the planning board would not be required to reject the subdivision plan on the grounds that the location of a proposed private way would be inappropriate because of the location of a proposed future public way shown on the official map pursuant to 81F. Whether they could voluntarily impose such a requirement pursuant to the regulations adopted under Section 81Q is not entirely clear although such a requirement has been approved with respect to existing streets. See Caruso v. Planning Board of Revere, 354 Mass. 569 (1968).

In communities which have not adopted the subdivision control law the official map performs a limited subdivision control function. Section 81E provides that "no permit for the erection of any building elsewhere than in a subdivision approved under the subdivision control law in any city or town having an official map shall be issued unless a way giving access to the lot upon which such proposed building is to stand has been placed on or made a part of such map...." Thus the approval of a private way by the process established by Section 81F would appear to be a prerequisite to an effective subdivision of land in such communities.

One final provision of Massachusetts law which should be noted in connection with the official map law is located in Chapter 82 (which deals with "the laying out, alteration, relocation and discontinuance of public ways, and specific repairs thereon"). c. 82, Section 37 provides a technique for preventing the construction of structures adjacent to existing ways which might subsequently interfere with the widening of such ways. It provides as follows:

"Building lines. If a city by its city council or a town accepts this section or has accepted corresponding provisions of earlier laws, a building line not more than forty feet distant from the exterior line of a highway or town way may be established in the manner provided for laying out ways, and thereafter no structures shall be erected or maintained between such building line and such way, except steps, windows, porticos, other usual projections appurtenant to the front wall of a building, embankments, walls, fences and gates, to the extent prescribed in the vote establishing such building line, and except that any structure existing at the time of the establishment of the building line may be permitted to remain and to be maintained to such extent and under such conditions as may be prescribed in the vote establishing such building line. Whoever sustains damage thereby may recover the same under chapter seventy-nine. A building line established under this section may be discontinued in the manner provided for the discontinuance of a highway or town way. Whoever sustains damages by the discontinuance of a building line may recover the same under chapter seventy-nine.

Again, it should be noted that it is tied to the existing procedure for laying out of ways and provides for eminent domain compensation for persons injured by the establishment of such building lines.

(Committee Recommendations)

The Committee recognizes that few communities have adopted official maps, a fact no doubt attributable to the fundamental ineffectiveness of the present enabling legislation as a technique for minimizing the cost of future acquisitions of land for public use. The arguments in favor of either a police power or eminent domain approach to the official map law problem have been clearly articulated in prior reports and recommendations to the legislature, as previously discussed, and are persuasive to the Committee. Specifically, the Committee recommends the following hybrid approach incorporating features of both the police power and eminent domain techniques:

- (1) Initial adoption of the official map would be by the local municipal legislative body (i.e., town meeting or city council) following hearings and recommendations by the planning board, the theory being that the financial implications of the official map occasioned by the modified use of the eminent domain power require the legislative imprimatur.
- (2) Once adopted, the building inspector would be required to deny permits to build on land shown as reserved on the official map. Also, the planning board in its administration of the subdivision control law will be required to take the official map into account in connection with applications for subdivision control approval. For example, the board would be required to consider locations of proposed ways shown on the official map in connection with approval of a subdivision plan showing streets which will eventually be connected with such proposed ways.
- (3) If a land owner believes himself to be injured by the application of the official map to his land, he may appeal to the zoning board of appeals for a variance which will permit a building to be constructed on such street or highway which will, as little as practicable, increase the eventual cost of opening such street or highway. After referral of such petition to the planning board for its recommendation, the board of appeals could grant such a "variance" where the hardship requirements of a variance as presently provided for in Chapter 40A, Section 15 are satisfied. If the petition is denied the applicant would have the same rights of appeal to the courts as are currently provided for in Chapter 40A, Section 21.

- (4) Finally, the Committee proposes that any actual taking of the property be deferred until the street or public facility is actually opened or constructed and that at such time the owner would be entitled to compensation for depreciated value of any building constructed on said land pursuant to the variance as well as for the value of the land itself. The Committee recognizes that this latter feature is a significant departure from the usual police power type of official map law, but is convinced that such modification is a reasonable compromise between the interests of the community in minimizing site acquisition costs for streets and other public improvements while at the same time protecting the land owner in situations where the variance granting power alone will be inadequate to protect his constitutional rights, e.g., where the opening of the street occurs before the cost of the improvements made pursuant to the variance have been fully amortized. In such situations the community will have the following options: (a) it can grant the variance and make appropriate compensation when the street is opened, (b) it may change the official map if a suitable alternative location is available or (c) it may take the street in lieu of granting the variance where the alternatives one and two are unattractive.

Aside from the question of the adoption of a police power and/or eminent domain approach to official maps, the Committee believes that the present official map law can be amended so as to make it a more effective tool in accomplishing its informational planning function. It should notify persons as to those things for which the community is responsible such as (a) streets, (b) parks and other major sites and (c) the legal status of existing ways as a tool for eliminating unneeded paper streets. Also the definition of private ways eligible for inclusion on the official map (which entitles them to special treatment in non-subdivision situations - see paragraph 3 of Section 81E) should be amended to exclude private ways from the official map which do not have sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the permitted use of land abutting thereon or served thereby, or which do not adequately provide for the installation of municipal services to serve such land and the buildings that may be lawfully erected thereon.

Additionally, the Committee believes that the official map should be an instrument to guide prospective private development into patterns compatible with contemplated public land acquisition. In many situations compensation may not be necessary where the future street pattern can coincide with a street which the developer would be required to provide in a normal course of subdivision development. In keeping with these objectives

the Committee recommends that the official map should show streets in relation to public parks, schools and other public properties; that all existing and projected public sites (not just streets and parks) should be shown; and that an official map might cover only part of the community particularly in areas only partially developed. Also sections 81Q and 81V should be amended so as to remove any doubt as to the validity of regulations which permit the planning board to require that the location of private ways in subdivisions be consistent with the location of proposed future public ways shown on the official map pursuant to 81F.

If the official map law is amended to authorize the police power or a more workable eminent domain technique for reserving the sites of future streets and the other public facilities as previously recommended, the Committee believes that serious consideration should be given to transferring Ch. 82, section 37, providing for the establishment of building setback lines, to the official map law. However, even if the official map law is to remain fundamentally unchanged, the Committee believes that the provisions of Ch. 82 dealing with building lines can be strengthened in terms of the overall planning process by providing for referral of proposed building lines to the planning board before such lines are established pursuant to the procedures provided in Ch. 82, section 37. Thus, the Committee recommends that section 37 be amended to provide for referral of building line proposals to the planning board in the same manner that is now required with respect to public ways.

Finally, the Committee believes that a reference to the mandatory referral provision of § 811 applicable in communities without an official map should be added to Ch. 82 where it will more easily come to the attention of city and town officials who are contemplating the "laying out" of ways pursuant to that chapter. For a recent example of the failure to follow the proper procedure, see Poremba v. City of Springfield, 354 Mass. 432 (1968).

Subdivision Control - Ch. 41, Sections 81K-81GG

Introduction

Subdivision control laws in Massachusetts originated in a concern over the effect of subdivision and sale of private land on planning and development of streets both public and private within a community. The first comprehensive subdivision control statute was enacted exclusively for the City of Boston in 1891. It provided that no person might open a public way until the layout and specifications were approved by the street commissioners. By 1916 similar powers were conferred on Boards of Survey in many cities and towns throughout the Commonwealth. With the revision of 1936 (see Acts 1936 c. 211) the subdivision control powers were expanded (e.g., there was a provision relative to "parks" as well as streets and utilities) and conferred on planning boards. The revision of 1953 (c. 674, Section 7) marks the beginning of a separate subdivision control law essentially in the form we now know it. Because of the length and complexity of the present law and the fact that many sections deal with more than one aspect of the law, the report of the Advisory Committee will not be based on a section-by-section analysis of the old law. Instead, an attempt will be made to present the Committee recommendations in the context of a functional analysis of the current law. For this purpose the following categories will be utilized:

- I. Administration and applicability of the subdivision control law;
- II. Purposes and limitations of the subdivision control power;
- III. Scope of the Act;
- IV. Administrative procedure;
- V. Enforcement;
- VI. Appeal.

I. Administration and Applicability of the Subdivision Control Law

(Present Law)

The Subdivision Control Law (c. 41, Section 81K-81GG) is usually administered by planning boards established pursuant to Section 81A. Such boards are normally composed of not less than 5 or more than 9 members appointed by the mayor in cities and either elected by the town meeting or appointed by the selectmen in towns. (See Section 81A).

However, it is also possible for the selectmen in towns of less than 10,000 population (see Section 81A and 81M) or a board of survey to be designed as a planning board for purposes of administration of the Subdivision Control Law (see Section 81L and 81N).

Basically, the question of whether the Subdivision Control Law shall be in effect in a particular community is decided by the local legislative body (city council or town meeting). The only peculiarity of the present law in this regard is that the question of whether or not the Subdivision Control Law shall become effective is normally posed in a negative form, i.e., in any community which has a planning board as defined in Section 81L, the Subdivision Control Law is in effect unless the local legislative body votes not to accept the provisions of the law. Thus, in such communities (keeping in mind the present 10,000 population figure for the mandatory establishment of planning boards -- see Section 81A) the burden is placed on the opponents of subdivision control rather than on its proponents (see Section 81N).

(Committee Recommendations)

Since the planning board is the principal administrator of the Subdivision Control Law it is obvious that changes relative to the operation of the board, although primarily concerned with the planning function, will also affect subdivision control. Thus the Committee recommendations relative to composition of the board, method of appointment, etc., (see Advisory Committee Recommendation on Municipal Planning, page 6 and 7) must be regarded in some sense as recommendations for change in the Subdivision Control Law as well. Beyond these particular issues the Committee has only two major recommendations relative to the Subdivision Control Law itself in the general area under discussion, the first being that communities which have established a planning board no longer have the option of refusing to initiate subdivision control. This recommendation obviously reflects the Committee's concurrence in the widely held view that effective subdivision control is an essential tool for implementation of the comprehensive plan which in turn should be initiated at an earlier stage in the growth process of most communities. The Committee has previously recommended in this connection that communities be required to establish a planning board when its population figure reaches 5,000 rather than 10,000. As a logical extension of the rationale behind this recommendation, the Committee recommends that communities with a planning board (and therefore, a comprehensive plan) be required to utilize subdivision control as a technique for implementation of the plan.

The Committee also recommends that the enabling legislation authorize local communities to adopt ordinances or by-laws delegating the power to administer subdivision plans previously approved by the planning board to other municipal officers or agencies, as appropriate, provided that any consequent modifications involving the integrity of the recorded plan would require the approval of the board itself. Minor modifications which in the judgment of the delegatee do not affect the property of abutting owners could be made without referral back to the board for formal approval. Thus the building inspector, zoning administrator, board of health, etc., could be delegated the power to release performance bonds or covenants after determination that the developer has satisfactorily installed municipal services or constructed ways in accordance with rules and regulations of the Planning Board. Minor changes in the layout of ways or location of municipal services could also be approved by the delegatee without referral back to the Planning Board. However, any fundamental modification such a change in the width or grade of streets or the existence of turn-arounds, etc., would require the formal action by Planning Board currently provided for in Section 81U.

II. Purposes and Limitations of the Subdivision Control Power (Present Law)

Historically, in most states subdivision control laws have served two functions. Most of the early subdivision control statutes were primarily concerned with insuring that plots of subdivisions be technically accurate and in good form for recording and tax assessment purposes. Shortly thereafter emerged a concern for the impact of subdivisions on street development within the community and many statutes were accordingly amended to provide for the regulation of the layout of ways when a subdivision of land occurred and in many states for a requirement that such ways be constructed by the developer. At one end of the spectrum today, we have subdivision control ordinances which attempt little beyond these limited objectives, although almost all states have now extended the scope of permissible subdivision regulation to include siting of lots and buildings and other related matters. At the other extreme we have subdivision control ordinances which attempt to make the developer bear a portion of the public cost of his development by requiring as a condition of plot approval the dedication of land to the community to be used for parks, playgrounds and schools and in some cases the payment of a sum of money in lieu of or in addition to such dedication. Furthermore, some authorities have suggested that subdivision control laws should be utilized for quantitative as well as qualitative control over development; viz, that approval of a subdivision should be predicated on a showing that there is a need for a development of the character proposed within the community as well as the assurance that the development will be of an acceptable quality -- in short, that subdivision control should be concerned with all aspects of the creation of a livable environment for the foreseeable future.

As previously stated, the early subdivision control laws in Massachusetts evidenced a primary concern for the impact of development on streets. However, with the Act of 1936 (c. 211) came an expansion of the subdivision control power. In addition to requiring adequate provisions for "street development and utilities", the Act (Section 3 - "Section 81E") provided as follows:

"Before ... approval, the board shall also in proper cases require that the plat show a park or parks suitably located for playground or recreation purposes.

"In approving such plats, the board shall require that ways shown thereon shall have proper grades and shall be of suitable width and suitably located to accommodate the prospective traffic and to afford adequate light, air and access, including access of firefighting equipment, to buildings and to be coordinated so as to compose a convenient system, and that the land shown on such plat shall be of such character that it can be used for building purposes without danger to health. In making such determination regarding ways, the board shall take into consideration the prospective character of the development, whether open residence, dense residence, business or industrial."

Thereafter, the subdivision control law was periodically subjected to the criticism that local boards were using the act to accomplish purposes beyond the purview of the subdivision control power. It was suggested for example, that planning boards could assume the power to regulate the area and widths of lots independent of the provisions of the local zoning ordinance or by-law. See, "More About Planning Boards and Zoning Act", John M. McCarty (May 1950) 35 Mass. L. Q. No. 2, p. 8. The report of the Special Commission on Planning and Zoning published in December 1952 (House No. 2249) reflected such criticism. Among the "defects" in the law which the Commission reported were the following:

"3. It is not made sufficiently clear that the application of the law is limited to regulating the design and construction of ways in subdivisions, and some well intentioned but overzealous planning boards have attempted to use their power of approving or disapproving plans of proposed subdivisions to enforce conditions doubtless intended for the good of the public, but not relating to the design and construction of ways within the subdivision; and it is said that some town counsels have approved this usurpation of power.

"4. There are provisions in the law which seem to authorize more arbitrary action by planning boards than is consistent with our ideal of constitutional government." Id. at 10.

Thus, one of the purposes of the comprehensive revision of the law proposed by the Commission was clarification of "the language of the Act, especially in some particulars where overzealous city planners have attempted to extend their authority to an extent greater than was intended by the framers of the law." Id. at 12.

As a consequence of the Committee report a new "purposes" section (81M) was added to the subdivision control law and important limitations on the subdivision control power were added to Section 81Q. The purposes of the subdivision control were stated to be the protection of the "safety, convenience and welfare of the inhabitants of the cities and towns in which it is, or may thereafter be, put in effect by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, which have not become public ways, and insuring sanitary conditions in subdivisions and in proper cases parks and open areas." Among the limitations imposed by 81Q are the following:

"Except insofar as it may require compliance with the requirements of existing zoning ordinances or by-laws, no rule or regulation shall relate to the size, shape, width, frontage, or use of lots within a subdivision, or to the buildings which may be constructed thereon, or shall be inconsistent with the regulations and requirements of any other municipal board acting within its jurisdiction.

"No rule or regulation shall require, and no planning board shall impose as a condition for the approval of a plan of a subdivision, that any of the land within said subdivision be dedicated to the public use, or convey or released to the Commonwealth or to the county, city or town in which the subdivision is located, for use as a public way, public park or playground, or for any other public purpose, without just compensation to the owner.

"Such rules and regulations shall not require referral of a subdivision plan to any other board or person prior to its submission to the planning board.

In the leading case interpreting these changes in the subdivision control law the court relied heavily on the legislative history and held that the planning board of Randolph was without authority to disapprove a plan because the proposed subdivision would seriously deplete existing water sources. In reaching this conclusion, the court emphasized that Section 81M "shows legislative concern primarily with (a) adequate ways to provide access furnished with appropriate facilities and (b) sanitary conditions of lots ... Even the consideration of 'safety in the case of fire, flood, [or] panic' would seem to have primary reference to road design, although the suitability of lots and ways for use as such with reference to the danger of flooding may be material, a matter which we need not now consider ... In the absence of more explicit statutory language, we interpret the authority of planning boards under the existing subdivision control law as not permitting disapproval of an otherwise proper plan on the ground that its execution would tax existing water sources. It is immaterial that somewhat comparable statutes elsewhere may be broader." Daley Construction Company, Inc. v. Planning Board of Randolph, 340 Mass. 154-155 (1960).

Turning from the negative aspects of the Massachusetts Subdivision Control Law, there are two sections which spell out the types of affirmative obligations which may be imposed on a developer. By rule or regulation, Section 81Q provides that the following requirements may be imposed on a developer in order to "carry out the purposes of the Subdivision Control Law as set forth in Section 81M":

Such rules and regulations may prescribe the size, form, contents, style and number of copies of plans and the procedure for the submission and approval thereof, and shall be such as to enable the person submitting the plan to comply with the requirements of the register of deeds for the recording of the same and to assure the board of a copy for its files; and shall set forth the requirements of the board with respect to the location, construction, width and grades of the proposed ways shown on a plan and installation of municipal services therein....

Such rules and regulations may set forth a requirement that a turn-around be provided at the end of the approved portion of a way which does not connect with another way.

The rules and regulations may, however, provide that not more than one building designed or available for use for dwelling purposes shall be erected or placed or converted to use as such on any lot in a subdivision, or elsewhere in the city or town, without the consent of the planning board, and that such consent may be conditioned upon the providing of adequate ways furnishing access to each site for such buildings, in the same manner as otherwise required for lots within a subdivision.

Such rules and regulations may set forth a requirement that underground distribution systems be provided for any and all utility services, including electrical and telephone services, as may be specified in such rules and regulations, and may set forth a requirement that poles and any associated overhead structures, of a design approved by the planning board, be provided for use for police and fire alarm boxes and any similar municipal equipment and for use for street lighting.

In connection with the latter provision the legislature has elsewhere in the General Laws (Chapter 166, Section 22A-22N) recently provided local communities with a technique for achieving the underground relocation of electrical distribution systems maintained on public property. Basically, this enabling legislation authorizes the planning board to propose the adoption of a program "(a) prohibiting new installation or construction of or (b) requiring progressive removal of poles and overhead wires or associated overhead structures within all or any part or parts of the municipality." (Section 22B). Thereafter, the town may adopt an ordinance requiring utilities to comply with the program, the annual cost of which cannot be required to exceed 2% of the utility's gross revenues within the community. Utilities subject to such ordinances are then authorized to collect a 2% surcharge on the annual bill of each customer within the community.

A final type of substantive requirement that may be imposed on the developer is contained in Chapter 41, Section 81U where it provides as follows:

"Before approval of a plan by a planning board, said board shall also in proper cases require the plan to show a park or parks suitably located for playground or recreation purposes or for providing light and air and not unreasonable in area in relation to the area of such land, and if so determined said board shall by appropriate endorsement on the plan require that no building may be erected on such park or parks for a period of not more than three years without its approval."

(Committee Recommendations)

The Committee recommends two major departures from the existing law relative to limitations on the subdivision control power. First, it believes that the existing limitation of Section 81Q, which prohibits as a condition for the approval of a plan, the dedication of land to public use, to be unwise and unnecessary in its present form. The Committee recognizes that as a question of constitutional law, there may be situations in which the exercise of the power to require dedication to public use would be held by the courts to be the taking of private property for public use without just compensation in violation of the Fourteenth Amendment. However, it is equally clear that the exercise of such power in many situations is entirely justified and has been approved by the courts of other states on a number of occasions. See, e.g., Jordan v. Village of Menomonee Falls, 28 Wisc. 2d 608, 137 N.W. 2d 442; Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182. The issue in most such litigation, is not whether it is constitutionally permissible to require the developer to absorb a fair share of the public cost of his development (i.e., costs attributable to the increased need for schools, playgrounds, recreational areas, streets, etc., necessary to service the new subdivision) but rather is addressed to the question of whether or not sufficient standards are articulated in the enabling act and by-law to guide the administrative agency in the proper exercise of such a power. See, e.g., Pioneer Trust and Savings Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 175 N.E. 2d 799 (1961). Thus, although in some cases the courts have struck down specific dedication requirements which were imposed on a developer, the general validity of such requirements is usually not challenged. An example of this is a recent Rhode Island case where the planning commission refused to allow the plaintiff to subdivide a tract of land because he would not voluntarily dedicate 7% of his land for recreational purposes as required by the city subdivision control regulation. He sought a declaratory judgment that the requirement was beyond the city police power and the trial court found for him. On appeal the decision of the trial court was affirmed. The court found that the General Assembly could require dedication as a condition of subdivision since "the natural result of subdivision, as shown by experience, is an increased need in the community for recreational areas, and to require developer to provide and donate that which, except for his proposed subdivision, would not be required is a valid exercise of the police power and not a taking without just compensation." However, the court held that "a developer may be required to donate only such portion of the land to be divided as may be needed for such public use as will result from the activities specifically and uniquely attributable to him ... It seems obvious to us that a fixed percentage requirement would inevitably create inequities, which will be less likely to arise under the specifically and uniquely attributable formula. See Frank Ansuini v. City of Cranston, 264A 2d 910 (R.I. 1970).

In view of the foregoing analysis, a majority of the Committee objects to the absolute prohibition of Section 81Q on the ground that it is much broader than the constitutional limitation applicable to such situations

and therefore imposes an unnecessary obligation on local communities already financially overburdened, to provide public or quasi-public facilities for the benefit of residents of new subdivisions, when often such facilities can and should be provided by the developer himself. Therefore, it recommends that the subdivision control law be amended to permit the imposition of a requirement by the Planning Board that a developer dedicate land for a park or parks suitably located for playground or other recreational purposes in situations where the need for such facilities "will result from activities specifically and uniquely attributable to the developer". In situations where the planning board determines that a suitable park or parks of adequate size cannot be properly located on any such plat or is otherwise not practical, the board may require as a condition to approval of any such plat a payment to the city or town of a sum to be determined by the board which sum shall constitute a trust fund to be used by the city or town exclusively for such a neighborhood park, playground or recreational purpose including the acquisition of land. Similar provisions have been recently upheld in several states. See, e.g., Aunt Hock Ridge Estates v. Planning Commission, 273 A.2d 880 (1970); Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (1971).

The second major change in the subdivision control powers of planning boards which the Committee recommends relates to the relationship between zoning and subdivision control. Although the existing law does not require the planning board to disapprove a plan because of the non-compliance with dimensional regulations of the existing zoning ordinance, the rules and regulations adopted pursuant to 81Q may so provide. The statute simply prohibits the imposition of bulk requirements other than those necessary to comply with existing zoning ordinances or by-laws. Even if the rules and regulations of a particular community did not require compliance with the zoning by-law as a condition of plat approval, it is clear that seldom would a developer submit a plan which did not so comply, since Chapter 40A, Section 12 provides that the permit issuing authority of a city or town "shall withhold a permit for the construction or alteration of any building or structure if the building or structure as constructed or altered would be in violation of any zoning ordinance or by-law or amendment thereof...." The Committee believes that in certain types of situations it may be highly desirable for the planning board to have limited authority to vary the application of zoning dimensional regulations to a particular subdivision. The New York Town Law (Section 281), for example, authorizes the planning board "to modify applicable provisions of the zoning ordinance, subject to the conditions hereinafter set forth and such other reasonable conditions as the town board may in its discretion add thereto...the purposes of such authorization [being] to enable and encourage flexibility of design and development of land in such a manner as to promote the most appropriate use of land, to facilitate the adequate and economical provision of streets and utilities, and to preserve the natural and scenic qualities of open lands." Such a procedure is particularly desirable in cases where it may be inappropriate to

apply the existing dimensional regulations because of unique topographic characteristics of the parcel in question such as irregularity, narrowness, shallowness or other natural factors in existence at the time of the enactment of the regulation from which relief is sought. An example of the application of such a power would be the reduction of frontage requirements or setback restrictions on one or several lots in a subdivision in order to preserve a desirable natural feature such as a tree or a stream. Limitations on the power, designed to assure that it is used only for such legitimate purposes would include a restriction of its application to dimensional requirements and a prohibition on its application in such a manner as to change the number of dwelling units or intensity of development in the subdivision which would be permitted, in the planning board's judgment, if the land was subdivided into lots conforming to the minimum lot size and/or density requirements of the zoning ordinance applicable to the district or districts in which such land is situated and conforming to all other applicable requirements.

The Committee also recommends an enlargement of the subdivision control powers exercised by planning boards in one other respect. Section 81Q authorizes planning boards to adopt rules and regulations to establish requirements "with respect to the ... installation of municipal services..., which requirements shall be established in such manner as to carry out the purposes of the subdivision control law as set forth in Section 81M." Section 81M speaks of "securing adequate provision for water, sewerage, drainage and other requirements where necessary in a subdivision..." Experience has shown that with respect to the installation of utilities considerations beyond those relative to the immediate needs of a development seeking approval should frequently be taken into account by the planning board. For example, sewer installations suitable for the present development may be inadequate when a subsequent development seeks to tie into them. Obviously, it would be unfair to require the first developer to bear the increased cost of sewer installations beyond those necessary for the immediate needs of his development, even though sound planning for the future dictates the necessity for giving the planning board the power to impose a requirement that such installations be made. The compromise suggested by the Committee would permit the regulations to require the installation of municipal services beyond those necessary for the immediate needs of the development, provided that the city or town agrees to compensate the developer for the increased cost of such installation. The Committee also believes that Section 81M should explicitly recognize that insuring paving of streets and the planting of trees adjacent to such streets are appropriate objectives of the subdivision control law.

III. The Scope of the Subdivision Control Act

For the purposes of the application of the Massachusetts Subdivision Control Law the legislature has adopted a definition of "subdivision" which is more inclusive than those found in many other jurisdictions. Chapter 41, Section 81L defines a subdivision as "the division of a tract of land in two or more lots and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision of land or territories subdivided...." This contrasts with the three to five lot minimum which is typical of subdivision control laws in many other jurisdictions. The Massachusetts definition, of course, has the advantage of preventing the phenomenon experienced in other jurisdictions of successive or "staged" development of a tract with a view to defeating the application of the subdivision control law. The principal exceptions from the application of the Massachusetts law are also established by Section 81L which provides:

".... that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is made, every lot within the tract so divided has frontage on (a) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or (b) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or (c) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of the vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and the installation of municipal services to serve such land and the buildings erected or to be erected thereon. Such frontage shall be of at least such distance as is then required by the zoning or other ordinance or by-law, if any, of said city or town for the erection of a building on such lot, and if no distance is so required, such frontage shall be of at least twenty feet. Conveyances or other instruments adding to, taking away from, or changing the size and shape of, lots in such a manner as not to leave any lots so affected without the frontage above set forth, or the division of a tract of land on which two or more buildings were standing when the subdivision control law went into effect in the city or town in which the land lies into separate lots on each of which one of such buildings remains standing, shall not constitute a subdivision."

The effect of the above definition is not only to exempt certain types of subdivisions of land from the application of the type of subdivision control regulation which the planning board is authorized to require under the

law, but also to change the non-conforming use status of land covered by such exemptions, since Chapter 40A, Section 7A currently provides for a seven year freeze on lots subject to the subdivision control law and a three year freeze on lots entitled to the endorsement under Chapter 41, Section 81P, "subdivision control approval not required".

S81FF deals with applicability of the subdivision control law to plans recorded prior to the time the subdivision control law became effective and to registered land. With respect to the former, the statute provides that such subdivisions shall not be "exempt ... from the operation of said law except with respect to lots which had been sold and were held in ownership separate from that of the remainder of the subdivision when said law went into effect ...". Land shown on plans which have been registered or confirmed by the land court prior to February 1, 1952, on the other hand, is treated as if the plan had been approved by the planning board under the subdivision control law.

Finally, Section 81Q extends the application of the subdivision control law to certain multi-structure developments that do not technically constitute a subdivision because there is no provision for dividing the tract into two or more lots. It provides as follows:

"The rules and regulations may, however, provide that not more than one building designed or available for use for dwelling purposes shall be erected or placed or converted to use as such on any lot in a subdivision, or elsewhere in the city or town, without consent of the planning board, and that such consent may be conditioned upon the providing of adequate ways furnishing access to each site for such building in the same manner as otherwise required for lots within a subdivision."

(Committee Recommendations)

The Committee believes that the current exemptions from the application of the subdivision control law have provided an unforeseen technique for evasion of the subdivision control power and are unwarranted even when not abused. The theory, of course, behind the exemption for subdivisions in tracts having frontage on a "public way" or ways shown on a plan previously "approved and endorsed in accordance with the subdivision control law" is that regulation of the location and construction of ways is unnecessary in such situations since adequate "ways" can be presumed to be already in existence. The Committee believes this assumption is predicated on an unnecessarily narrow view of the purpose of the subdivision control power and fails to take cognizance of other objectives of subdivision control such as "... securing safety in the case of fire, flood, panic and other emergencies; for assuring compliance with the applicable zoning ordinances or by-laws; for securing adequate provision for water, sewage, drainage, underground utility services, fire, police and other similar municipal equipment, and street lighting and other requirements where necessary in a subdivision; for coordinating the ways in a subdivision with each other and with the public ways in a city or town in which it is located and with ways in neighboring subdivisions." See, S81M. Furthermore, these provisions may offer an opportunity for abuse as evidenced by one Massachusetts case where the subdivider received an endorsement from the planning board that subdivision control approval was not required where the "frontage" was on a state highway that was separated from the private property by a guard rail and where the record indicated that the level of the highway was five to six feet or more higher than the developer's land so that "persons or fire hose and the like could get access to the corporation's premises by going through or over the guard rail on the [highway] but not vehicular traffic...." See record page 14-15, Carey v. Planning Board of Revere, 335 Mass. 740 (1956). The subdivision control approval "not required" procedure also has the indirect effect of permitting the subdivision control law to be used as a vehicle for establishing a zoning freeze with respect to property that does not involve a "subdivision" in any sense of the word. The last paragraph of Chapter 40A, Section 7A provides that "when a plan referred to in Section 81P, Chapter 41 has been submitted to a planning board ... the use of the land shown on such plan shall be governed by applicable provisions of the zoning ordinance or by-law in effect at the time of the submission of the plan ... for a period of three years..." Chapter 41, Section 81P deals with the procedure for approval of plans not requiring subdivision control approval and is not restricted to plans which would constitute subdivisions were it not for the restrictive definition of Chapter 41, Section 81L. Therefore, under the existing law an owner of a single lot can secure the subdivision control approval not required endorsement on a "plan" of such a lot, record the plan, and arguably achieve a three year zoning freeze both with respect to dimensional and use regulations. The Committee believes that the above practices should be discontinued. In its recommendations on the zoning enabling act the Committee has recommended that the zoning freeze be determined on a formula basis (two years to ten years,

depending on the number of lots in the subdivision) without regard to whether the lots are shown on approved subdivision plans, a plan not requiring subdivision control approval under 81P, or a plan of land in a community where the subdivision control law is not in effect or where it was not in effect at the time the plan was recorded. It is also there recommended that the freeze be limited to residential uses. (Developers of commercial or industrial properties would not be entitled to a zoning freeze unless they obtained a building permit.) In keeping with the philosophy behind these recommendations and its conviction that valuable planning objectives other than regulation of street development can be achieved by the application of the subdivision control power to many situations now excepted from such power by virtue of the "subdivision control approval not required" procedure, the Committee recommends that such endorsements be limited to "subdivisions" (i.e. "the division of a tract of land into two or more lots....") which are created by "plans, conveyances or other instruments adding to, taking away from, or changing the size and shape of existing lots in a manner which does not increase the number of lots or leave any lots so affected either without the frontage required under the applicable subdivision control ordinance or by-law or in any respect not conforming to the requirements of the ordinances or by-law". The Committee is concerned to protect future purchasers of lots, and the community, from a number of ill-effects which the present sweeping exemption does not prevent. One is the cutting off of a piece of a lot in such a way as to create a zoning non-conformity (for example as to required lot-area or side-yard); even though the purchaser under many zoning codes would not be allowed to "count" the land he bought toward his own zoning requirements, he might now know this, and he and the city or town could be involved in considerable difficulties. Another potential kind of problem is the thoughtless chopping up of a frontage into a series of lots which, though conforming to the letter of the zoning regulations, could be substantially improved by judicious redesign into better sites for houses or other buildings more sensitively related to topography or natural features, perhaps requiring the kind of minor modifications in zoning dimensional requirements proposed and discussed above (pp. 31-32). The third kind of problem, potentially the most serious, could result from selling off shallow lots along an entire frontage, preventing future access to the back land - either any access, or the optimum access in terms of the topography and drainage of the whole area, whether the backland is owned by the frontage subdivider or by others (if by others, the frontage owner could not be required to donate the needed access-strip, but should be required to reserve it). These are only the most obvious examples of reasons for cutting back on the present wide exemption of subdivisions from discretionary Planning Board review.

Thus the revised definition of "subdivision" would read as follows:

"Subdivision" shall mean the division of a tract of land into two or more lots, plots, sites or other division of land, for the purpose whether immediate or future, of transfer of ownership or building development and shall include resubdivision, and, when appropriate to the context, shall relate to the process of subdivision or the land or territory subdivided; provided, however, that the division of a tract of land into two or more lots shall not be deemed to constitute a subdivision within the meaning of the subdivision control law, if, at the time when it is made, such division does not create one or more new lots or sites for building or development and does not reduce the size or dimensions of any such pre-existing lot or site in such a way as to create or to increase any nonconformity to the requirements of any applicable zoning ordinance or by-law. If there are no such zoning regulations applicable, such a division shall not be deemed to constitute a subdivision within the meaning of the subdivision control law if, at the time when it is made, such division does not create one or more new lots or sites for building or development and does not reduce the frontage of any such pre-existing lot or site below twenty feet. Frontage shall be upon a way having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon; and further provided that no building site upon such lot fall within the bed of a street shown on an official map. The term frontage as herein used shall mean the length of the street line of a street abutting the lot in question over which pedestrians and automobiles have legal and easy physical access onto that lot. The end of streets without turning circles shall be considered frontage.

IV. Administrative Procedure (Present Law)

The procedures by which the subdivision control law is administered are found in Sections 810 through 81X. The relevant details of that administrative process are as follows:

Section 81Q - In addition to providing for the establishment of requirements to be imposed on developers and imposing limitations thereon (see supra Part II), Section 81Q basically deals with the procedures for adopting and amending such rules and regulations. It provides for adoption by the planning board after a public hearing and specifies that such rules shall include not only substantive regulations relative to the location, construction, etc., of proposed ways and municipal services, but also technical matters such as "size, form, contents, style and number of copies of plans and the procedure for the submission and approval thereof such as will enable the person submitting the plan to comply with the requirements of the Registrar of Deeds for the recording of plans and to assure the board of a copy for its files...." Such rules may not require referral of a subdivision plan to any other board or person prior to its submission to the planning board. Section 81Q further provides that after adoption a copy shall be kept on file in both the offices of the planning board and the city or town clerk and shall also be transmitted to the Registry of Deeds, the latter action being a condition precedent to effectiveness. Once a plan is submitted to the planning board it is governed by the rules and regulations then applicable, regardless of subsequent amendments. The same is true of preliminary plan, "provided that the definitive plan [evolved therefrom] is duly submitted within 7 months from the date on which the preliminary plan was submitted."

Section 81R permits the Planning Board in particular cases "where such action is in the public interest and not inconsistent with the intent and purposes of the subdivision control law" to waive strict compliance with its rules and regulations. In such situations the Board may approve the plan subject to conditions "limiting the lots upon which buildings may be erected and the number of buildings which may be erected on particular lots and the length of time for which such particular buildings may be maintained without further consent by the Planning Board to the access provided." Examples of the application of this section are Lyman v. Planning Board of Winchester, 352 Mass. 209 (1967) and Caruso v. Planning Board of Revere, 354 Mass. 569 (1968) where the court upheld the Planning Board's waiver of rules requiring the alignment of roads, sewers, etc., so as to connect up properly with similar facilities in adjacent areas. In each case the Board determined that "no useful purpose" would be served by imposing the usual requirements in view of the unusual topography in the area being developed. As the court said in Lyman, "[s]ection 81R gives recognition to the fact that a regulation, although in general sound and reasonable may be unreasonable when applied to particular land or in unusual circumstances." 352 Mass. 209, 214.

Section 81S establishes the procedure for submission of preliminary plans before the final submission of a definitive plan. Preliminary plans, where submitted, go to the planning board and the board of health and written notice that such a preliminary plan has been submitted goes to the city or town clerk by delivery or by registered mail. Thereafter, within 60 days after submission of a preliminary plan each board must notify by certified mail the applicant and clerk of the city or town either that the plan has been approved, or that the plan has been approved with modifications suggested by the board or agreed upon by the person submitting the plan, or that the plan has been disapproved; in the case of disapproval, the board must state in detail its reasons therefor. The Planning Board must notify the city or town clerk of its approval or disapproval, as the case may be. Generally the provisions of the subdivision control law relating to a plan are not applicable to a preliminary plan, and no Registrar of Deeds may record a preliminary plan.

Section 81T and 81O establish the procedures for the filing, notice and hearing of definitive plans. Section 81O provides that a plan is "submitted . . . when delivered at a meeting of the board or when sent by registered mail to the planning board, care of the city or town clerk. If so mailed, the date of mailing shall be the date of submission of the plan." The date of "submission" is important because Section 81U provides that the report by the Board of Health must be made within 45 days following submission. Failure to report is deemed approval where the proposed plan will be serviced by a municipal sewerage system. Similarly, final action by the Planning Board must be taken within a specified time after filing as discussed below and, again, failure to act is deemed approval. Section 81T establishes the requirement of a public hearing as a prerequisite to Board action on a plan. Notice of this hearing is given by publication (at the applicant's expense) and the mailing of a copy of the advertisement to the applicant and all owners of land abutting upon the land included in the plan as they appear on the most recent tax list.

Section 81U - The first two paragraphs of this section deal with administrative procedures relative to approval or disapproval of a definitive plan. A copy of the plan is submitted to the Board of Health which must report in writing within 45 days, or the proposed subdivision, which will be serviced by a municipal sewerage system, shall be deemed approved. Approval of the plan by the Planning Board must occur within 60 days after filing. In the event of disapproval the Planning Board "shall state in detail wherein the plan does not conform to the rules and regulations of the planning board or the recommendations of the health board officer" and shall in all cases file a certificate of its action with the city or town clerk, a copy of which shall be recorded by him in a book kept for that purpose and shall send notice of such action by registered mail to the applicant. Failure to take action in 60 days is deemed approval except that an extension of the time may be granted at the written request of the applicant.

Section 81W - This section gives the Planning Board the power, on its own motion or on petition of any interested person, to "modify, amend or rescind its approval of a plan of a subdivision, or to require a change

in a plan as a condition of its retaining the status of an approved plan." The one significant qualification on the power to modify is the provision that "no modification, amendment or rescission of the approval of a plan of a subdivision or change in such plan shall effect the lots in such subdivision which have been sold or mortgaged in good faith for a valuable consideration subsequent to the approval of the plan, or any rights appurtenant thereto, without the consent of the owner of such lots, and the holder of the mortgage or mortgages, if any, thereon." Section 81W provides that "all of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision, so far as appropriate" are applicable to the exercise of the power of amendment..." Section 81DD provides that damages sustained by "any person injured in his property by reason of the modification, amendment or rescission of the approval of a plan under Section 81W without his consent" are recoverable under Chapter 79.

(Committee Recommendations)

Section 81Q - The Committee has concluded that rules and regulations dealing with substantive requirements imposed on developers should be proposed by the planning board after appropriate public hearings, but that formal adoption should be by the city council or town meeting, as currently provided with respect to zoning ordinances or by-laws, on the theory that like zoning regulations, such subdivision control requirements involve an exercise of the police power which has a profound effect on private property rights. Although it is appropriate for the administration of such power to be delegated to a planning board, the Committee has serious reservations whether the essentially legislative function involved in the formulation of such rules should be delegated to a local administrative agency. Furthermore, the Committee believes that such requirements gain much in terms of public acceptability when they obtain a legislative imprimatur and that there is a corresponding benefit to the planning board in terms of administration. Thus, the Committee proposes that a distinction be drawn in Section 81Q between substantive and procedural "rules and regulations" with only the latter being subject to adoption by the planning board without involvement of the local legislative process. In keeping with the foregoing analogy to zoning regulations, the Committee proposes that the provisions of 81Q establishing a cutoff date for compliance with amended subdivision control rules and regulations be changed to correspond with the requirements of Chapter 40A, Section 7A and 11 relative to the effect of amendments to the zoning ordinance or by-law on subdivision plans and permits. With respect to those rules and regulations requiring legislative adoption, therefore, the freeze would not extend to any plan submitted prior to the adoption of new rules or regulations, but only to plans submitted prior to the notice of a hearing on such proposed rules and regulations and would extend only for a period determined by the formula recommended by the Committee relative to zoning amendments. See, Draft of Proposed Advisory Committee Section on non-conforming uses, Paragraph B.

Section 81R - The Committee believes that the power given to Planning Boards to waive compliance with subdivision control rules and regulations should be extended to include modification of zoning regulations in certain cases. See, discussion supra, Subdivision Control, Part II, page 31. To implement this recommendation the following paragraph should be added to Section 81R:

"An ordinance or by-law may authorize the Planning Board, simultaneously with approval of a plat or plats pursuant to this Act, to modify applicable provisions of the zoning ordinance or by-law relating to dimensional requirements subject to the conditions hereinafter set forth and such other reasonable conditions or limitations as the ordinance or by-law shall add thereto. The purposes of such authorization shall be to enable and encourage flexibility of design and development of land in

such a manner as to promote the most appropriate use of land, to facilitate the economical provision of streets and utilities, and to preserve the natural and scenic qualities of the land being developed. The conditions hereinabove referred to are as follows:

(a) If the owner makes a written application for the use of this procedure, it may be followed at the discretion of the Planning Board if, in said Board's judgment, its application would benefit the City or Town;

(b) This procedure shall be applicable only to lands zoned for residential use, and where its application will result in a permitted number of dwelling units which in no case exceeds the number which could be permitted, in the Planning Board's judgment, if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning ordinance or by-law applicable to the district or districts in which such land is situated and conforming in all other applicable requirements."

(c) A notice specifying which lots and in what respects the zoning requirements have been modified shall be signed by a majority of the members of the board or a person authorized by it and recorded in the same manner as a notice of a zoning variance as provided in Chapter 40A, Section 13.

Implementation of this recommendation also requires that the sentence of Section 81Q which reads: "Except insofar as it may require compliance with requirements of existing zoning ordinances or by-laws, no rule or regulation shall relate to the size, shape, width, frontage or use of lots within a subdivision, or to the buildings which may be constructed thereon, or shall be inconsistent with the regulations and requirements of any other municipal board acting within its jurisdiction..." be amended by adding the following "except, as provided in Section 81R." Also, the Committee recommends that 81R be amended to permit the attaching of appropriate conditions (i.e., conditions which might be imposed in a non-waiver situation) to any waiver of 81Q rules and regulations. Under the present law conditions imposed in waiver cases may only relate to the number of lots upon which buildings may be erected and the length of time for which particular buildings may be maintained.

Section 81S - The Committee recommends three minor modifications in Section 81S. The time period for action on a preliminary plan by the Planning Board and Board of Health should be extended to 65 days to enable

Boards which meet on a monthly basis to always have two meetings between the time of submission and report. Also, the notice of action by the respective boards should be sent not only to the applicant, but to the other board as well. Finally, the Committee recommends that Section 81S no longer exempt preliminary plans from the provisions of the subdivision control law relating to a plan with the exception that such plans still may not be recorded.

Section 81T - In its recommendations relative to Chapter 40A the Committee advocated the adoption of a uniform notice section applicable to all public hearings. In the interest of uniformity, the Committee recommends that those notice procedures also be utilized in connection with the subdivision control law. The notice provisions in Section 81T should be amended to read as follows: "Before approval, modification and approval, or disapproval of the definitive plan is given, a public hearing shall be held by the Planning Board, notice of which shall be given pursuant to the provisions of Chapter 40A, Section 15."

Section 81O - The Committee believes that the procedures for filing of plans should be more flexible. In communities which have no professional planning staff and a planning board which meets on a monthly basis, the present language of Section 81O has the practical effect in some situations of starting the Statute of Limitations to run on the filing of a Board of Health report and final action by the Planning Board a considerable period of time before the Planning Board has a real opportunity to become aware of the pendency of the matter. For example, if the plan were "submitted" the day following a regular planning board meeting, 30 days would elapse before the board even begins to start in motion the machinery for reaching a final decision, i.e., notice of hearing, hearing, deliberation, etc. Therefore, the Committee recommends that Planning Boards, when they adopt procedural rules, be authorized to establish a date and place for the regular monthly submission of plans (e.g., the regular monthly planning board meeting or the week preceding such meetings) and that only in the event of the failure of the Planning Board to establish such procedures will the present Section 81O procedure be followed.

Section 81U - Few changes are recommended by the Committee with respect to the procedural aspects of this section. In order to insure that the Planning Board had an opportunity to hold a hearing after the Board of Health report is received especially in communities where the Planning Board meets on a monthly basis, the Committee recommends that the period be extended from 60 to 65 days. The Committee also recommends that the developer be required to supply information regarding engineering requirements in compliance with the coastal and inland wetlands acts where appropriate. Such a requirement could be included in Section 81U or as part of a definition of "definitive plan" to be included in Section 81L.

The Committee also recommends that an expeditious procedure should be authorized with respect to modifications or amendments of plans which result from changing lot lines from previously approved plans where there is no departure from a strict interpretation of the zoning ordinance or by-law and no change in a physical or sanitary characteristic of the lot.

Section 81W - The Committee recommends that the powers of the planning board to deal with problems posed by old subdivisions of land prior to the subdivision control law or to previously approved plans under the subdivision control law where conditions have changed be broadened in certain respects, particularly with respect to so-called "paper subdivisions." Such paper subdivisions were typically created by plans created long before subdivision control went into effect and are frequently characterized by very small lots serviced by non-existent, inadequate or improperly located ways and utilities. Under the present law such lots are exempt from the application of the subdivision control law if the lots have been sold and were held in ownership separate from that of the remainder of the subdivision when the law went into effect. (81FF). Similarly, the power of the Board to modify, amend or rescind previously approved plans cannot be exercised with respect to lots "which have been sold or mortgaged in good faith and for a valuable consideration subsequent to approval of the plan, or any rights appurtenant thereto, without the consent of the owner of such lots, and the holder of the mortgage or mortgages, if any, thereon." The Committee believes that with respect to these types of situations the powers conferred on the old Boards of Survey established under Chapter 41, Section 73 are superior to those presently contained in the subdivision control act. Chapter 41, Section 76 provides that such boards may make changes on plans so filed, this power being subject only to the right given persons injured by such changes to recover damages under Chapter 79. (See Chapter 41, Section 81). The Committee recommends that the Board of Survey practice be made applicable to planning boards exercising subdivision control powers. In this connection the damages provisions of Section 81DD relative to such modifications, amendments or rescissions should be transferred to the same section that confers powers on the Board to make such changes.

In order to effectuate the above recommendations, the first two paragraphs of Section 81W would be amended to read as follows:

A Planning Board, on its own motion or on the petition of any person interested, shall have the power to modify, amend or rescind its approval of a plan of a subdivision, or to require a change in a plan as a condition to its retaining the status of an approved plan; provided, however, any person injured in his property by reason of the modification, amendment or rescission of the approval of a plan under Section 81W without his consent in writing may recover the damages so caused under Chapter 79.

All of the provisions of the subdivision control law relating to the submission and approval of a plan of a subdivision shall, so far as appropriate, be applicable to the approval of the modification, amendment or rescission of such approval and to a plan which has been changed under this section except that the Board may waive compliance with such procedures where the change of the plan is in the form of an alteration of lot lines, and there is no departure from a strict interpretation of the zoning ordinance or by-law and no change in the physical or sanitary characteristics of the lots by virtue of such alteration.

Also the first paragraph of Section 81FF would be amended to read as follows:

So far as land which has not been registered in a land court is affected by the subdivision control law, recording of the plan of a subdivision in a registry of deeds before the subdivision control law was in effect in the city or town in which the subdivision was located shall not exempt the land within such subdivision from the operation of said law; and plans of subdivisions which were recorded in the registry of deeds and subdivisions made without the recording of a plan after said law had gone into effect in such city or town and before February 1, 1952, without receiving the approval of the Planning Board of such city or town, shall have the same validity and effect as if the subdivision control law became effective in such city or town on February 1, 1952, as above provided. Any person injured in his property by reason of the application of the subdivision control law to lots which had been sold and were held in ownership separate from that of the remainder of the subdivision when said law went into effect in such city or town, and to rights of way and other easements appurtenant to such lots, may recover damages so caused under Chapter 79.

V. Enforcement of the Subdivision Control Law (Present Law)

The Massachusetts Subdivision Control Law contains a variety of techniques for enforcement of the requirements of the Act. Section 810 provides that no person shall make a subdivision of any land in any city or town in which the subdivision control law is in effect unless he has first submitted to the planning board of such city or town for its approval a plan of such proposed subdivision.

Section 81X provides that no subdivision plan shall be recorded by the Registrar of Deeds unless endorsed by the Planning Board as approved or that subdivision control approval is not required, or "is endorsed by the clerk of the city or town that it has been endorsed by inaction."

Section 81Y provides several techniques for enforcement:

(1) It prohibits acceptance or construction of public ways and the construction or improvement of municipal services to service any land in an unapproved subdivision.

(2) It provides that no building permit shall issue until the permit issuing authority is satisfied that subdivision control laws have been complied with.

(3) It provides that any person who conveys an interest in lots in an unapproved subdivision shall be liable for all damages sustained by the person receiving such interest by reason of the failure to comply with the subdivision control law.

(4) Finally, Section 81Y provides that the local superior court may grant injunctions on petition of the planning board or ten taxable inhabitants of the community to enforce the provisions of the subdivision control law.

Section 81U also provides several techniques for enforcement of the law. Before endorsement of its approval of the plan the board must require that the construction of ways and the installation of municipal services be secured by a performance bond and/or covenant executed and recorded by the owner of the land which runs with the land and prohibits the sale of the lots before such performance. Thereafter, Section 81Y establishes elaborate provisions dealing with the disposition of the bond or covenant as the developer complies with conditions endorsed on the plan. Basically, as the developer performs according to the schedules agreed upon, the bond or covenant can be released in whole or in part. In cases where the developer finances the development by a first mortgage "covering the premises shown on the plan" the board has the option of entering into an agreement with the lender and the developer that in return for release of the covenant, the lender will retain "sufficient

funds otherwise due the applicant to secure the construction of ways and the installation of municipal services. Said agreement shall also provide for a schedule of disbursements which may be made to the applicant upon completion of various stages of the work, and shall further provide that in the event the work is not completed within the time set forth by the applicant any funds remaining undisbursed shall be available for completion."

(Committee Recommendations)

The Committee believes that many of the duties of planning boards with respect to the enforcement of the endorsements and requirements of the definitive plan, after final approval, could be in some communities more efficiently performed by other city or town agencies or officials. Where the only question is whether the developer has complied with the performance specifications relative to street construction, for example, the local department of public works could well be delegated the authority to make such determinations. Furthermore, the committee believes that more flexibility should be built into the administration of the law with respect to the need for minor modifications of the plan which appear necessary as construction progresses and which do not affect adjacent property or compromise the overall integrity of the plan. At present such changes often require the formal modification procedures of Section 81W. The Committee recommends that communities be authorized to include a provision in the substantive rules and regulations adopted pursuant to Section 81Q, that the planning board may delegate its post-approval enforcement authority to appropriate city or town agencies or officials as well as the power to make minor modifications in construction without the formal process provided for in Section 81W, in cases where in the judgment of such official the change is in the public interest, not inconsistent with the intent or purposes of the subdivision control law, and does not affect adjacent property not owned by the developer.

One other minor modification of the enforcement procedures of 81Y recommended by the Committee is the change from a one to a two year statute of limitations on actions against developers for damages sustained by purchasers or the town by virtue of the failure of the developer to comply with the requirements of the subdivision control law and the endorsements on the plan made pursuant to Section 81U.

VI. Appeal (Present Law)

Chapter 41 provides three different mechanisms for subdivision control appeals. Section 81Z establishes a "board of appeals" which may also be the board of appeals under the local zoning and building laws. Such boards have jurisdiction to issue a permit for the erection of a building under Section 81Y which provides in paragraph 2 that no building permit shall be issued unless the lot on which the building is to be erected a) is not within a subdivision or b) a way furnishing access to the lot is shown on a plan entitled to be recorded under Section 81X and that all conditions endorsed on such plan have been satisfied. A similar restriction applies in communities which have a rule or regulation which requires "that not more than one building for dwelling purposes be erected or placed or converted to use as such on any lot without its consent", i.e., no permit shall issue unless the permit granting authority is satisfied that such consent has been obtained. The last paragraph of Section 81Y then provides that "if ... the enforcement of the foregoing provisions of this paragraph would entail practical difficulty or unnecessary hardship, and if the circumstances of the case do not require that the building be related to a way shown on such a plan, the board of appeals provided for in Section 81Z shall have the power by vote of a majority of its members to issue a permit for the erection of such building, subject to the provisions of said Section 81Z and Sections 81AA and Sections 81BB."

Section 81BB provides the basic judicial appellate procedure for any municipal officer or board or any person "aggrieved by a decision by a board of appeals under Section 81Y, or by any decision of a planning board concerning a plan in a subdivision, or by the failure of such a board to take final action concerning such a plan within the required time", i.e., "appeal to the superior court sitting in equity for the county in which the land concerned is situated." Such appeals must be taken within twenty days "after such decision has been recorded in the office of the city or town clerk or within twenty days after the expiration of the required time." However, an alternative to the Section 81BB procedure is available to adjacent land owners who fail to take such an appeal within the required 20 day period. Such persons under the holding of Bloom v. Planning Board of Brookline, 346 Mass, 278 (1964), if they can secure the joinder of nine other "taxable inhabitants", can bring an action under Section 81Y which provides as follows:

"The Superior Court for the county in which the land affected by any other provisions of the subdivision control lies, shall have jurisdiction in equity on petition of the planning board of a city or town or of ten taxable inhabitants thereof, to review any action of any municipal board or officer of such city or town in disregard of the provisions of this section and to annul and enjoin such action, to enjoin the erection of a building in violation of this section, and otherwise to enforce the provisions of

the subdivision control law and any rules or regulations lawfully adopted and conditions on the approval of a plan lawfully imposed thereunder, and may restrain by injunctions violations thereof or make such decrees as justice and equity may require. No proceeding under this paragraph shall be instituted more than one year after the act or failure to act on which such petition is based."

(Committee Recommendations)

The Committee has two major recommendations with respect to the Chapter 41 appeals procedures. First, it believes the little used board of appeals procedure established by Section 81Z and 81AA to be unnecessary. Limited discretion to vary the otherwise applicable requirements of the subdivision control law is already vested in the planning board under Section 81R which provides that "a planning board may in particular cases, where such action is in the public interest and not inconsistent with the intent and purpose of the subdivision control law, waive strict compliance with its rules and regulations, and with the frontage or access requirements specified in such law...." The Committee believes that the planning board is the more appropriate body to exercise the analogous power now vested in the board of appeals by Section 81Y. Being charged with the on-going administration of the subdivision control law, it is more likely to appreciate the impact of non-compliance with the subdivision control law on adjacent property and the general plan than can a "board of appeals" which in many cases may be unfamiliar with the purposes being served by particular subdivision control law requirements. Therefore, the Committee recommends that the board of appeals procedure be eliminated from Chapter 41 and that Section 81Y be amended to vest the power presently exercised by such appeals board in the planning board. Appeal from the planning board decision in such cases would then go directly to the Superior Court under Section 81BB.

The Committee also recommends that Section 81Y be amended to limit the applicability of the Section 81Y "petition" for review and enforcement. Under the interpretation placed on this section by the Bloom case the procedure becomes an alternative remedy to abutters who desire to challenge the approval of a subdivision plan and who have failed to take a Section 81BB appeal within the required 20 day period. In cases where there is no public notice with respect to the planning board's decision - e.g., endorsements that the subdivision control law approval is not required under 81P or actions for damages for failure to comply with the subdivision control law under 81U - perhaps the alternative remedy is justified on the theory that an aggrieved person may not be adequately apprised of the board's decision within the 20 day period provided in Section 81BB. However, with respect to cases involving the approval of the subdivision plan after public notice and hearing under Section 81U, the Committee believes that developers who have taken all proper steps necessary to obtain approval of their subdivision should not be required to wait one year before being able to proceed with safety in the development of such a plan. The Committee recommends that the last paragraph of Section 81Y be amended to read as follows:

"The Superior Court for the county in which the land affected by any of the provisions of the subdivision control law lies shall have jurisdiction in equity on petition of the planning board of a city or town, or of ten taxable inhabitants thereof, to review any action of any municipal board or officer of such city or town, other than approval of a subdivision plan under Section 81U, in disregard of the provisions of this

section and to annul and enjoin such action, to enjoin the erection of a building in violation of this section, and otherwise to enforce the provisions of the subdivision control law and any rules or regulations lawfully adopted and conditions on the approval of a plan lawfully imposed thereunder, and may restrain by injunctions violations thereof or make such decrees as justice and equity may require. No proceeding under this paragraph shall be instituted more than one year after the act or failure to act upon which such petition is based."

In order to make sure that all persons who are aggrieved by a decision of a planning board to approve a subdivision under Section 81U have adequate notice of that fact, the Committee also recommends that the last sentence of paragraph 2, Section 81U be amended to read as follows: "The planning board shall file a certificate of its action with the city or town clerk, a copy of which shall be recorded by him in a book kept for the purpose, and shall send notice of such action by registered mail, postage prepaid, to the applicant to his address stated on the application and to every person present at the hearing who request that notice be sent to him and states the address to which such notice is to be sent."

